Supreme Court, U.S.
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90-140

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LABORERS PENSION TRUST FUND
FOR NORTHERN CALIFORNIA,
Petitioner,
vs.
MARION J. IMEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a multiemployer pension fund established pursuant to the Labor-Management Relations Act, 29, U.S.C. § 186(c)(5), and covered by the Employee Retirement Income Security Act, 29 U.S.C. § 1000 *et seq.* an employer of one of its participants within the meaning of the term "private employer" as used in 38 U.S.C. § 2022?

2. Does a provision of a multiemployer employee pension benefit plan that limits past service pension credit for periods of military service to a participant who was employed in a permanent position in work of the type for which past service credit is granted under the plan immediately prior to such military service and was reemployed by his preservice employer within 90 days after release from active duty, or within 90 days after recovery from a disability continuing after his release from active duty, violate the provisions of 38 U.S.C. § 2021?

3. Is an industry composed of employers who contribute to a multiemployer employee pension beneifit plan the employer of a participant in the plan within the meaning of the term "private employer" as used in 38 U.S.C. § 2021*

*The names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit are a follows:

1. Laborers Pension Trust Fund for Northern California. — *Defendant/Appellant*
2. Board of Trustees of the Laborers Pension Trust Fund for Northern California

The individual members of the Board are as follows:

Employer Trustees	*Employee Trustees*
Morris K. Daley	Thomas S. Clarke
Hans H. Larsen	George Evankovich
James W. Lowrie	Paul Radford
Clifford Swenson	Bill Smith
Anthony Walsh	Archie Thomas

George Evankovich has retired and on June 1, 1990, he was succeeded as a member of the Board by Billy R. Leonard.

3. Marion J. Imel — *Plaintiff/Appellee*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Laborers Pension Trust Fund for Northern California respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on May 22, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at F.2d and is printed in Appendix A. The Memorandum of Opinion and the Judgment of the United States District Court for the Eastern District of California is unofficially reported in 10 Employee Benefit Cases 1819 and is printed in Appendix B.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on May 22, 1990. This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

This case involves §§ 2021 and 2022 of Title 38, Chapter 43, of the United States Code ("Veteran's Readjustment Act" or "VRA"). These statutes are printed in Appendix C.

STATEMENT OF THE CASE

I

THE NATURE OF PETITIONER, ITS PENSION PLAN AND THE CONTESTED PLAN PROVISION

Petitioner Laborers Pension Trust Fund for Northern California ("Fund") is a multiemployer pension fund established in 1963 through collective bargaining pursuant to Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. Section 186(c)(5), under collective bargaining agreements between two chapters of the Associated General Contractors of America and the Northern California District Council of Laborers, covering laborers employed in building and construction work in the 46 Northern Counties of California. Since January 1, 1975, the Fund has been an employee pension benefit plan covered by the Employee Retirement Income Security Act, 29 U.S.C. Section 1001 *et seq.* ("ERISA").

When first established in 1963 the Pension Plan maintained by the Fund provided that a covered employee would receive credit toward a pension, called "Past Service Credit," for periods of actual employment as a laborer in the building and construction industry in the 46 Northern California Counties area between August 1, 1937, and August 1, 1962. Since the Fund had not received any employer contributions with respect to this past employment, the effect of this provision was that the cost of providing pensions based on the employment would be paid out of

employer contributions generated by the work of covered employees performed after August 1, 1962.

When the Plan was revised to conform with ERISA effective June 1, 1976, the following paragraph was added by amendment to the past service credit provision of the Plan:

> "A Participant shall also be granted Credited Past Service for each Plan Credit Year, or portion thereof, of military service during such period in the Armed Forces of the United States for the period during which he retained reemployment rights under Federal law, provided the Participant was employed in a permanent position on work of the type for which Credited Past Service is granted immediately prior to such military service and was reemployed by the employer for whom he was working immediately prior to his entry into such military service within 90 days after release from active duty or within 90 days after recovery from a disability continuing after his release from active duty."

The amendment was in response to the claim of a participant to Past Service Credit for the period of his military service in 1961 and 1962. The participant had worked as a laborer for Granite Construction Company from June, 1958 to September, 1960, and upon his honorable discharge from military service, had returned to his laborer position with Granite Construction Company in October, 1962.

The participant's claim was presented by a letter from a Compliance Officer of the United States Department of Labor, Labor Management Services Administration, in which reference was made to the Veteran's Reemployment Rights Act (now termed the Veteran's Readjustment Act) and which then stated:

> "Basically, this law requires that an eligible veteran be reemployed by his *preservice* employer with such status in his employment as he would have enjoyed if he had been continuously employed during his military absence.
>
> • • • • •
>
> "As previously noted, the law in question requires that the *preservice* employer, when reemploying the veteran, treat the

veteran as if he had been continuously employed during his military absence."[1]

The amendment was drafted by the consultant and co-legal counsel for the Fund at the direction of the Board of Trustees to provide Plan participants with the rights given returning veterans by the Veterans' Reemployment Rights Act, but not to extend the Past Service Credit liability of the Fund beyond such rights in order to keep any increase of the unfunded vested liability of the Fund to a minimum.

II

THE PERTINENT PROVISIONS OF THE VETERAN'S RE-ADJUSTMENT ACT

38 U.S.C. Section 2021 provides, in pertinent part, as follows (App. C):

> "(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (*other than a temporary position*) *in the employ of an employer* in order to perform such training and service, and . . . (2) makes application for reemployment within ninety days after such person is relieved from such training and service . . .
>
> • • • •
>
> "(B) If such position was in the employ of . . . a *private employer*, such person shall—
>
> (i) if still qualified to perform the duties of such position, be *restored by such employer or employer's successor in interest* to such position or to a position of *like seniority, status, and pay;* or

---

[1] Emphasis is added throughout this petition unless otherwise indicated.

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of *such employer or the employer's successor in interest,* be offered employment and, if such person so requests, be employed by *such employer or the employer's successor in interest* in such other position the duties of which such person is qualified to perform as will provide such person *like seniority, status, and pay,* or the nearest approximation thereof consistent with the circumstances in such person's case.

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so . . .

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been *on furlough or leave of absence during such person's period of training and service in the Armed Forces,* shall be so *restored* or *reemployed* without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence *in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.*

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) or subsection (a) of this section should be so *restored* or reemployed in such manner as to give such person such status in his employment as he would have enjoyed *if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment."*

38 U.S.C. Section 2022 provides, in pertinent part, as follows (App. C):

> "If any *employer*, who is a *private employer* . . . , fails or refuses to comply with the provisions of Section 2021(a), (b)(1) or (b)(3), or 2024 of this title, the district court of the United States in any district in which *such* private employer maintains a place of business, . . . shall have the power, upon the filing of a motion, petition or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require *such* employer to comply with such provisions and to compensate such person for loss of wages or benefits suffered by reason of such employer's unlawful action... In such action *only the employer* shall be deemed a necessary party respondent . . . "

It is clear from the emphasized portions of Sections 2021 and 2022 that the plain, obvious and rational meaning of the words of those Sections is that a returning veteran's reemployment rights extend only to his preservice employer, with whom the veteran held an other than temporary position and had a normal employer-employee relationship before he entered the service and upon whom the reemployment obligation could reasonably be imposed, or to the successor in interest of such employer.

III

THE APPLICATION OF THE CONTESTED PLAN PROVISION TO RESPONDENT

In June 1951 respondent Imel joined Laborers Local Union 185 ("Union"), a local union affiliated with the Northern California District Council of Laborers. He was dispatched by the Union to a job for Utah Construction Co. on a dam diversion tunnel project in Amador County, where he worked above ground clearing bush. After approximately two weeks he was laid off and returned to the Union hall, registering on the "out of work" list. Shortly thereafter he was dispatched to a tunnel job on the same project to work for Walsh Construction Co. He worked from June to September 1951, when the job ended.

Imel returned to the Union hall and again registered on the "out of work" list. Within a few days he was dispatched to a job on the Folsom Dam project, where he worked for Atkinson Co. doing power house construction excavation. The job site was flooded in November 1951 and he was laid off. He returned to the "out of work" list and within two weeks he was dispatched to work for T.E. Connelly on the Folsom diversion tunnel project. He worked for almost four months and was laid off, again returning to the "out of work" list.

Within a week he was dispatched to a job with Atkinson Co. on the Folsom project, where he worked until laid off in December 1952. He returned to the "out of work" list and in January 1953 he was dispatched to a job with Tarlton Construction Co. on a diversion tunnel for the Sly Park Dam project at Pollock Pines. He worked for Tarlton until shortly before March 6, 1953, when he was drafted into the military service. Tarlton's tunnel project lasted from the first part of 1952 to the end of 1953, and Tarlton has not performed any other work in California prior to or subsequent to those dates.

Imel was honorably discharged from the military service on March 4, 1955. He returned to the Union hall and the "out of work" list and in April 1985, he was dispatched to a brush clearing job with Utah, Bates and Rogers on a tunnel project near Oroville. He continued to work as a construction laborer on projects in Northern California until he retired in 1979. At the time of his retirement Imel had accumulated 25¼ years of Past and Future Credited Service under the Fund's Plan. Because of the contested provision of the Plan the Past Credited Service did not include the period from March 1953 to March 1955, and in connection with Imel's retirement application, a Compliance Officer of the Department of Labor presented a claim for such Credited Service on his behalf.

The Department of Labor first took the position in support of Imel's claim that he had returned to his pre-service employer because Laborers Local Union 185 was that employer within the meaning of the Veteran's Readjustment Act. As the claim progressed through the Plan's claim review procedure, however, various representatives of the Department of Labor identified the

pre-service employer as (1) each individual employer in the Associated General Contractors, (2) the Associated General Contractors itself, (3) the industry overall and finally (4) the Fund.

At the completion of the claim review procedure the Board of Trustees of the Fund at a meeting in December, 1980, denied Imel's claim to Credited Past Service for the period of his military service on the ground that he was not entitled to such Credited Past Service under the terms of the Plan and that the granting of such service credit was not required by 38 U.S.C. Section 2021. The Department of Labor was notified of the Board's decision and in November, 1983, the complaint in this action was filed by the United States Attorney in the United States District Court for the Eastern District of California. The sole statutory basis for subject matter jurisdiction alleged in the complaint was 38 U.S.C. Section 2022, the Fund was the sole defendant named in the action and the sole basis alleged for a recovery against the Fund was that the refusal to count Imel's period of military service toward his "credited service" under the Plan constituted a violation of the Veteran's Reemployment Rights Act, 38 U.S.C. Section 2021 *et seq.*

IV
ANALYSIS OF THE DECISIONS BELOW

In its memorandum of opinion (App. B) the District Court ruled that it had subject matter jurisdiction under 38 U.S.C. Section 2022 upon the authority of *Smith v. Industrial Employers and Distrib. Assn.* 546 F. 2d 314 (9th Cir. 1976), cert. den., 431 U.S. 965, 65 S.Ct. 2921 (1971), "even though the defendant trust fund is not the employer" (App. B., p. 7). As to the merits of Imel's claim, the court found that "a *de facto* hiring hall procedure was operated in the Northern California [construction] industry prior to 1959 and [Imel] was generally required to go through the union to secure employment in the industry" (*ibid*, p. 12); that "the true nature of the benefits involved here is to reward the length of service within the industry itself and not with any single contractor" (*ibid*, p. 12); and that "there is a reasonable certainty [Imel's] pension benefits would have continued to

accrue in full had [Imel] not entered military service" (*ibid*, p. 13). The court concluded that "the industry itself (which is composed of the employers who make up the trust plan) must be the focus, rather than a single contractor, when a pension is pursuant to a multiemployer plan" (*ibid*, p. 13) and upheld the Department of Labor's contention "that when a multi-employer pension plan is involved, it is the particular industry that must be treated as the employer rather than the specific contractor" (*ibid*, p. 13).

The court ordered that petitioner award Imel past service credit for the period of his military service and a judgment accordingly was entered. Petitioner filed a timely appeal to the Court of Appeals and the Court of Appeals affirmed the judgment by a two to one vote of the panel.

With regard to the issue of subject matter jurisdiction posed by the plain words of 38 U.S.C. Section 2022, the majority of the panel avoided characterizing petitioner as Imel's "employer" but concluded (App. A, p. 11):

> "In view of the remedial nature of the Act, the Supreme Court's teaching that the Act should be given 'as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits,' *Fishgold*, 328 U.S. at 285, this circuit's commitment to a liberal interpretation of the Act consistent with *Fishgold*, and decisions from other circuits which have reached the same results, we hold that the district court had jurisdiction over Imel's suit against the Fund."

As to the issue of "necessary party" also posed by Section 2022, the majority stated that "the Fund is the only party with a significant interest in the proceeding" and concluded "that Imel may maintain his suit against the Fund notwithstanding the absence of any of Imel's construction contractor employers as a party to the litigation" (*ibid*, p. 12).

In response to petitioner's contention that Imel had not returned to his preservice employer the majority said (*ibid*, p. 13):

> "The district court's focus on the industry as an employing unit is also supported by section 2021(a)(B)(ii) of the Act. That section provides that successors in interest must afford a veteran the same rights as their predecessors. Act, § 2021(a)(B)(ii). This language of the Act reflects Congress' desire for a broad right to reemployment and seniority, not limited by technical changes in corporate form or reorganization. In the Northern California construction industry, the multiemployer group is made up of changing employer members: contractors enter and leave the area and go in and out of business. Nonetheless, the multi-employer group is a consistent entity, bound by its collective bargaining agreements with the Union and its participation in the trust which created the Fund."

It concluded that "by returning to work in the Northern California construction industry following his discharge from military service, Imel returned to the same 'employer' for the purposes of the Act" (*ibid*, p. 14).

Finally, as to petitioner's contention that Imel had left a temporary position to enter military service and therefore did not have reemployment rights under the plain terms of the Veteran's Readjustment Act, the majority said (*ibid*, pp. 14-15):

> "The test for whether a position is other than temporary and subject to the Act 'is whether the veteran, prior to his entry into military service, had a reasonable expectation, in light of all of the circumstances of his employment, that his employment would continue for a significant or indefinite period.' . . . "
>
> Here, the district court found that Imel 'had a reasonable expectation that, but for the brief interruption during which he served in the military, he would have continued to work in the [Northern California] construction industry under the multi-employer pension plan in question and accordingly would have continued earning pension credits.' *Imel*, mem. op. at 22. This finding is not clearly erroneous. It establishes

the basis for concluding that Imel's pre-service employment was not of a temporary nature.' . . . "

The dissenting judge was brief and to the point. He said (*ibid*, pp. 15-16):

"The majority opinion reaches its result by effectively stretching the word and the concept 'employer' beyond all recognition, giving it new meaning that no ordinary person could possibly anticipate or comprehend. All of a sudden, 'employer' includes possibly an industry as a whole, a trust fund, or a union to which Mr. Imel was a member but for which he never worked. Unions in this circuit, as the Fund in this case, will certainly be surprised to discover that their members may be really their employees for certain purposes, and they will be more than interested to discover that they may have unexpected financial responsibilities for which no provisions have been made. We *construe* statutes, yes, but we do not redefine words, especially when the redefinition carries important policy implications with it. That is up to the people who write dictionaries or Congress—not judges. The majority opinion calls this a 'liberal construction' of the key word and the statute: I respectfully see it as verbal anarchy.

* * *

The Fund argues with vigor that what the majority does creates a huge financial burden on the Fund for which no provisions have been made. The majority opinion waives this off as an 'economic argument.' I see it as something a legislature would want to consider seriously.

Were I a member of Congress, I might find myself very sympathetic to the majority's policy reasons for wanting to include people like Mr. Imel within the scope of this Act. But as a judge, I must regrettably tell him he is in the wrong forum."[2]

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[2] Emphasis is by the dissent.

REASONS FOR GRANTING THE WRIT

The basic reason for granting the writ is that, as succinctly stated by the dissenting judge, the Court of Appeals reached its result by "stretching the word and concept 'employer' beyond all recognition, giving it new meaning that no ordinary person would possibly anticipate or comprehend" (see *supra*). By so doing the majority exceeded the limits of the Court's judicial authority and violated Section 1 of Article I of the Constitution vesting all legislative powers in Congress.

As this Court said in *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 618, 64 S.Ct. 1215, 1221 (1944):

> "While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid 'that retrospective expansion of meaning that properly deserves *the stigma of judicial legislation.' Kirschbaum Co. v. Walling,* 316 U.S. 517, 522, 62 S.Ct. 1116, 1119, 86 L.Ed. 1638."

This fundamental constitutional principle has been reiterated and enforced by this Court in many different contexts, most recently in *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 194-195, 98 S.Ct. 2279, 2301-2302 (1978), and the subsequent decisions of the Court citing that case. Specifically, insofar as the principle relates to the construction of the Veteran's Readjustment Rights Act, the Court has admonished that notwithstanding the liberal construction to be given legislation benefiting veterans, "the judicial function to be exercised in construing a statute is limited to ascertaining the intention therein expressed. A casus omissus does not justify judicial legislation" (*Ebert v. Poston,* 266 U.S. 548, 554, 45 S.Ct. 188, 190 (1925)).

The admonition of this Court in the *Ebert* case was followed by the Court in *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 66 S.Ct. 1105 (1946), upon which the majority relied so heavily in construing the term "private employer" as used in the Veteran's Readjustment Act. In rejecting the veteran's argument in Fishgold that the Act's guarantee against "discharge" included a guarantee against "layoff" the Court said that "[w]e would

distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services" (328 U.S. pp. 285-286, 66 S.Ct. at p. 1111).

The admonition was also followed by the Tenth Circuit Court of Appeals in *Christner v. Poudre Valley Cooperative Ass'n,* 235 F.2d. 946 (10th Cir. 1956), affirming 134 F.Supp. 115 (D.Colo. 1955). In that case the Court of Appeals affirmed the district court's decision that the grant in Subsection (d) of Section 9 of the Universal Training and Service Act of federal court jurisdiction over claims under Subsections (b) and (c)(1) of that Section could not be extended to claims arising under Subsection (g)(3) of the Section. In so doing the Court said (235 F.2d at p. 950):

> "Courts should confine themselves to the construction of a statute as it is written and not attempt to supply omissions or otherwise amend or change the law under the guise of construction.
>
> The fundamental rule of construction is that the court shall ascertain and give effect to the intention of the legislature, as expressed in the statute.
>
> An unambiguous statute should be given effect according to its plain and obvious meaning."

The reasons behind this fundamental rule of construction were explained by the district court in the following terms (134 F.Supp. at p. 122):

> "Even though I might believe that Congress, through inadvertence, failed to afford (g) (3) claimants the benefit of federal jurisdiction and the aid of the United States attorney, as provided in subsection (d), *I can find no justification for an attempt by the courts to correct such inadvertence by doing violence to the plain import of the language used by Congress.*
>
> * * * *
>
> It may be that considerations of public policy would commend the granting of jurisdiction, or that the exercise of

> jurisdiction would be consistent with the general plan or scheme evidenced by Congress. *However, unless the statutory grant may be so construed without doing violence to the plain meaning of the words used, as viewed in the light of their legislative history and other helps in interpretation, it would seem beyond the power of a court to pull jurisdiction out of the air, as it were. A liberal construction of a statute cannot mean an inaccurate and unjustifiable construction. Moreover, if my conclusions as to the limitations of subsection (d) are found ultimately to be correct, prompt recognition of those limitations would offer a better hope for sound corrective legislation than apologetic, hesitant and ineffective acceptance of it as meaning something which it does not say.*
>
> It is fundamental that this Court is one of limited jurisdiction and that its jurisdiciton in the particular case must affirmatively appear if it is to be exercised."

Notwithstanding the majority's repeated citation and great reliance upon this Court's opinion in the *Fishgold* case, it made no pretext of following the Court's careful analysis in that case of the language used by Congress in the Act it was construing (328 U.S. pp. 284-289, 66 S.Ct., pp. 1111-1113). Instead, it distorted the term "private employer" as used in 38 U.S.C. § 2022 by reading it to mean the Fund, and then, without acknowledging the inconsistency, distorted the same term as used in 38 U.S.C. § 2021 by reading it to mean the Northern California construction industry.

The injury done by this "verbal anarchy" does not end with the imposition upon the Fund of a substantial unanticipated vested liability for which no provision has been made. A far greater injury is done to those employers and unions who have striven for years to provide pension benefits to the employees who perform the casual labor so much a part of the building and construction industry. The "industry" identified by the district court and the Court of Appeals as the "employer" of Imel for the purposes of the Veteran's Readjustment Act is "composed of the employers who make up the plan," *supra*, p. 9; that is, the employers who, through agreements with the Union, maintain the Fund by making monthly contributions to it.

It is these employers—and *only* these employers—whom the Court of Appeals has tagged as the "successors in interest" of Imel's preservice employers who "must afford a veteran the same rights as their predecessors"; namely, "a broad right to reemployment and seniority, not limited by technical changes in corporate form or reorganization" (*supra*, p. 10). To compound the injury, under the holding of the Court of Appeals, a veteran in Imel's situation could leave a position that was admittedly casual and temporary and establish reemployment rights *ex post facto* by returning to the Northern California contruction industry long after the project on which he had been working had been completed (*supra*, p. 10).

The employers who contribute to the Fund compete with other employers—so-called non-union contractors—who are in fact part of the Northern California construction industry, but who do nothing to provide pensions to employees who perform casual labor. The non-union contractors have a built-in competitive advantage in that their labor costs do not include pension and other fringe benefit contributions. To add to this advantage, the disadvantages imposed upon contributing employers by the ill-defined but costly veteran reemployment obligations legislated by the decision of the Court of Appeals would have a chilling effect upon the contributing employers and might well lead to withdrawals from participation in the Fund. The very existence of the decision, unreversed, exposes every contributing employer to the claims of veterans seeking reemployment in the industry and creates a disincentive to continued participation.

Thus, the construction of the term "private employer" as used in 38 U.S.C. § 2021 as including the "Northern California construction industry composed of the employers who make up the plan" brings the Veteran's Readjustment Act into direct conflict with the statutory purpose of Title IV of ERISA "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants," which was declared by Congress in 29 U.S.C. § 1347a(1). This was also the purpose of ERISA generally as explained by its authors in Congressional debates (Senate debate, July 29, 1980 - Statements by Senators Harrison A. Williams, Jr. (D-NJ) and Jacob K. Javits (R.NY),

reprinted in BNA ERISA: Selected Legislative History 1974-1985, at p. 115) and is reflected in provisions of that Act designed to remove or avoid disincentives to such continuation and maintenance (see *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515, 101 S.Ct. 1895, 1902 (1981); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11, 107 S.Ct. 2211, 2217 (1987)).

As the dissent points out, what the majority opinion says is "that as a matter of *policy*, Mr. Imel and people similarly situated should also receive the benefits of the Veteran's Readjustment Act" (App. A, p. 16).[3] When, however the implementation of that policy comes in conflict with the policy of another equally important statute, only Congress has the facilities with which to resolve the conflict. In the words of this Court in *Diamond v. Chakrabarty*, 447 U.S. 303, 317, 100 S.Ct. 2204, 2212 (1980):

> "What is more important is that we are without competence to entertain these arguments—either to brush them aside as fantasies generated by fear of the unknown, or to act on them. The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts."

The fact that a statute is to be liberally construed cannot justify a court in rewriting or ignoring its language (*Potomac Elec. Power Co. v. Director, Etc.*, 449 U.S. 268, 283-284, 101 S.Ct. 509, 517 (1980)).

The lengths to which the courts below have gone in distorting the provisons of the Veteran's Readjustment Act to accomodate the casual nature of employment in the building and construction industry emphasize the importance of the point made by the district court in the *Christner* case, *supra* pages 13-14; namely,

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[3] Emphasis is by the dissent.

that a prompt and forthright recognition of the limitations of the existing statute is far more likely to result in sound corrective legisation than the "verbal anarchy" of construing terms as meaning something that they do not say. This is particularly so in this case, where construction of the term "private employer" in the Veteran's Readjustment Act as meaning that portion of the building and construction industry composed of the employers who contribute to an employee pension benefit plan serves to discourage the employers from continuing their participation in the plan.

CONCLUSION

In view of the foregoing points and authorities, we submit that the Court should grant the petition for writ of certiorari for the following reasons:

1. The Court of Appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; namely, the decision of the Court of Appeals for the Tenth Circuit in *Christner v. Poudre Valley Cooperative Assn.*, 235 F.2d 946 (10th Cir. 1956), *aff'g.* 134 F.Supp. 115 (D. Colo. 1955), that the grant of jurisdiction to the United States district courts contained in the Universal Military Training and Service Act, the predecessor of the Veteran's Readjustment Act, cannot be extended beyond the plain import of the language used by Congress in that Act.

2. The Court has decided a federal question in a way in conflict with applicable decisions of the Supreme Court; namely, that the salutary purpose sought to be achieved by veterans' legislation cannot justify judicial legislation (*Elbert v. Poston*, 266 U.S. 548, 554, 45 S.Ct. 188, 190 (1925); *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 285-286, 66 S.Ct. 1105, 1111 (1946); compare, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S.Ct. 2279 (1978)).

3. The Court has rendered a decision which will impose a substantial financial burden of an undetermined amount upon the Fund and the employers who support the Fund, and purports to impose upon those employers the obligation to restore a returning veteran to the position he held prior to his entry into military service or to a position of like seniority, status and pay, and to continue him in that position for a period of one year, unless he is discharged for cause. This construction of the Veteran's Readjustment Act is in direct conflict with the policy underlying enactment of the Employee Retirement Income Security Act and its amendments, namely, to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants, and presents an important question of federal law which has not been, but should be, settled by this Court.

Respectfully submitted,
San Francisco, California
July 19, 1990.

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(Appendices A, B and C follow)

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-15668
D.C. No. CV-83-1406-EJG

Marion J. Imel,
Plaintiff-Appellee,

v.

Laborers Pension Trust Fund for Northern California,
Defendant-Appellant.

[Received May 23, 1990]

OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
February 8, 1990—San Francisco, California

Filed May 22, 1990

Before: Herbert Y. C. Choy, David R. Thompson and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Thompson; Dissent by Judge Trott

SUMMARY

Armed Services and Veterans/Pensions

Affirming a judgment of the district court, the court of appeals held that a narrow reading of the word "employer" as used in the Veteran's Readjustment Act, 38 U.S.C. § 2021 et seq. (1982), is inconsistent with the statute as a whole.

Appellee Marion Imel worked in the Northern California construction industry for over twenty-five years. He joined the Union in 1951 and was dispatched from the Union hiring hall to

various contractors consistently until his retirement in 1979. His employment was interrupted for two years by his compulsory military service during the Korean War. Upon his return, Imel worked for a contractor covered by the appellant Laborers Pension Trust Fund for Northern California but not the same contractor he worked for prior to his military service. The Fund appealed from the district court's judgment granting Imel pension credit for the time he spent in service. The Veteran's Readjustment Act requires that an employee who leaves employment for compulsory military service and returns to the same employer not lose his position, seniority, or status because of his military service.

The Fund argued that the district court did not have jurisdiction because section 2022 of the Act creates a right of action against an "employer" and the Fund did not employ Imel. However, the court agreed with the view taken by the Second Circuit. A narrow reading of the word "employer" as used in the Act is inconsistent with the statute as a whole. In view of the remedial nature of the Act, the Supreme Court's teaching that the Act should be given as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits, the Ninth Circuit's commitment to a liberal interpretation of the Act, and decisions from other circuits which have reached the same result, the court held that the district court had jurisdiction over Imel's suit against the Fund.

The Fund also argued that Imel's suit is fatally flawed because Imel's employer is a "necessary party" and no employer was sued. In this case, the Fund is the only party with a significant interest in the proceeding, it is the party who will provide any relief, and in light of the Act's objectives, it is the only appropriate party for Imel to hale into court in this litigation.

The Fund argued that even if Imel may maintain his suit, he still loses because he did not return to work for the same employer he had worked for immediately prior to entering military service. The court found that Imel had returned to the appropriate party since he went through the same Union hiring hall procedure as he did before his military service and was assigned to a contractor covered under the pension plan. Imel had no control over where

he was sent to work. Moreover, the district court found that benefits under the Plan were designed to reward an employee according to his length of service within the industry and not with any single contractor. This finding is consistent with the Fund's own documentation.

Finally, the Fund argued that Imel failed to meet the Act's seniority provision which requires that the returning veteran must show that he left a position, other than a temporary position, for military service, contending that Imel's last employment preceding his military service was only casual and the project he was working on was of limited duration. The court disagreed, finding that Imel had a reasonable expectation that, but for the brief interruption of his military service, he would have continued to work in the Northern California construction industry under the multi-employer pension plan in question and accordingly would have gone on earning pension credits. Imel's pre-service employment was not of a temporary nature.

Judge Trott dissented in a separate opinion, stating that the majority opinion reaches its result by stretching the word and the concept "employer" beyond all recognition, giving it new meaning that no ordinary person could possibly anticipate or comprehend. The majority opinion rewrites the law to achieve a desirable result.

COUNSEL

Thomas E. Stanton, Stanton, Kay & Watson, San Francisco, California for the defendant-appellant.

Mark S. Flynn, United States Department of Labor, Washington, D.C., for the plaintiff-appellee.

OPINION

THOMPSON, Circuit Judge:

The Laborers' Pension Trust Fund for Northern California ("Fund") appeals the district court's judgment, after a bench trial, granting Marion J. Imel ("Imel") pension credit for the time Imel spent in military service. The Veteran's Readjustment

Act (the "Act")[1], 38 U.S.C. § 2021 et seq. (1982), requires that

[1] Section 2021 states in relevant part:

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

. . .

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay;

. . .

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

. . .

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as

an employee who leaves employment for compulsory miitary service and returns to the same employer not lose his position, seniority or status because of his military service. The Fund argues that because it never employed Imel, the district court did not have jurisdiction under section 2022 which creates jurisdiction

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to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

Section 2022 states in relevant part:

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a),(b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to . . . such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney . . . No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent.

The Act has been recodified several times: The Selective Training & Service Act of 1940, ch. 720, § 8(b), 54 Stat. 890, reenacted as The Military Selective Service Act of 1967, 50 U.S.C. App. § 459 (1970), reenacted as the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2021 et seq. *See Monroe v. Standard Oil Co.*, 452 U.S. 549, 554 n.8 (1981); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 194 n.2 (1980). For clarity, we refer to the most recent codification, as no relevant changes have been made. *Barrett v. Grand Trunk W.R.R. Co.*, 581 F.2d 132, 133 n.2 (7th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979).

in the district court for suits by a person returning from compulsory military service against his previous employer. The Fund also argues that Imel did not return to his previous employer because, upon his return from military service, while he returned to work in the Northern California construction industry, the Union dispatched him to work for a different construction company within that industry. We have jurisdiction under 28 U.S.C. § 1291 (1982) and we affirm.

FACTS

The Fund was established in 1963 by two groups of contractors (two chapters of the Associated General Contractors of America) and the Northern California District Council of Laborers ("Union"). Under the Fund's pension plan ("Plan"), individual contractors make contributions for each hour paid and/or worked by covered employees. To qualify for a pension, the employee must earn a minimum amount of industry service-year credits. Credit is given for work done during the years 1937-1962, before the Fund was created. Credit is earned for each incident of employment with any covered contractor within the industry, even though the employment may have been of short duration or for different contractors. The amount of a covered employee's retirement pension is based upon the number of credits the employee has earned.

The Plan was amended by the trustees on October 18, 1977, retroactive to June 1, 1976, to provide that a person returning from compulsory military service would receive credit for his period of military service if he "was employed in a permanent position . . . immediately prior to such military service and was reemployed by the employer for whom he was working immediately prior to his entry into such military service." Plan, Article 6, § 6.02a.

Imel worked in the Northern California construction industry for over twenty-five years. He joined the Union in 1951 and was dispatched from the Union hiring hall to various contractors consistently until his retirement in 1979. His general pattern was to work for several weeks, or months, on a project until he was

laid off or until the project was finished, then to be put on the out-of-work list for a few days (up to one month) until a new project was available. His employment was interrupted by his compulsory military service in the Korean War, from March 6, 1953 to March 5, 1955. Upon his return, Imel worked for a contractor covered by the Fund, but this contractor was not the same contractor he had worked for immediately prior to his military service.

The district court found that the Union operated a *de facto* "hiring hall" for the industry in Northern California during the relevant period. The Union controlled the dispatch of employees to the pension-covered jobs throughout the industry. "Use of that practice essentially guaranteed that as long as plaintiff sought work by registering at the Union hall he would be dispatched to jobs covered by the pension plan here in dispute." *Imel v. Laborers Pension Trust Fund*, No. S-83-1406EJG, mem. op at 13 (E.D. Ca., Oct. 25, 1988). The Union hiring hall process "was treated as mandatory for obtaining work." *Id.* at 14. The district court also found that "there is a reasonable certainty that plaintiff's pension benefits would have continued to accrue in full" absent military service. *Id.* at 17.

The district court found that Imel's position was not temporary, because he "had a reasonable expectation that, but for the brief interruption during which he served in the military, he would have continued to work in [the Northern California construction] industry under the multi-employer pension plan." *Id.* at 22. The district court gave Imel credit for his two years of military service in computing his pension benefits. Imel's future pension payments were adjusted to reflect this credit, and the fund was required to pay Imel a lump sum for total back-due benefits, plus prejudgment interest. The Fund appeals.

ANALYSIS

A. *Standard of Review*

1. *General Rule*

The interpretation of a statute is a question of law which we review de novo. *See, e.g., Saratoga Sav. & Loan Ass'n v. Federal*

Home Loan Bank Bd., 879 F.2d 689, 691 (9th Cir. 1989) (National Housing Act of 1934); *Batchelor v. Oak Hill Medical Group*, 870 F.2d 1446, 1447 (9th Cir. 1989) (ERISA). Findings of fact are reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52(a); *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989).

2. *ERISA and Deferential Review*

The Fund contends that the district court should have deferred to the trustee's interpretation of the Plan. *See Malhiot v. Southern Cal. Retail Clerks Union*, 734 F.2d 1133, 1135 (9th Cir. 1984) (eligibility decisions by trustees not reversed unless "arbitrary, capricious, made in bad faith, not supported by substantial evidence . . . "). As the district court stated, however, the question is not whether the trustees properly interpreted the Plan, but whether the Fund is required to provide seniority benefits to Imel under the Act. Private parties may not agree to alter statutory duties. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). The court makes its own determination regarding requirements of the Act and will reverse a trustee's decision if it is "erroneous on a question of law." *Malhiot*, 735 F.2d at 1135.

B. *Jurisdiction*

The Fund argues that the district court did not have jurisdiction because section 2022 only creates a right of action against an "employer," and the fund did not employ Imel.

Imel and the Labor Department contend that the Northern California construction industry was Imel's employer. They argue that because of the circumstances prevalent in that industry, it is difficult to name one party which served as Imel's employer in the literal sense of the word. They assert that Imel had an employer-type relationship with a number of "employers." First, they point out that Imel was paid and supervised by the individual contractors covered by the Union hiring hall. Second, he was hired by, directed by, and responsible for reporting to the Union. Third, the Fund recorded and administered all pension benefits. All three of these circumstances are traditionally "employer" functions, say

Imel and the Labor Department, and thus in the Northern California construction industry, no one entity controls the employee in all aspects of the employment relationship.

Essentially, the Fund's argument is that we ought to give the word "employer," as used in the statute, its plain meaning. As the Second Circuit described this argument in *Korea Shipping Corp. v. New York Shipping Ass'n*, 880 F.2d 1531, 1532 (2d Cir. 1989), the Fund "argue[s] in effect that the [district court's] wholly different reading of the word 'employer' reinforces the notion that words don't mean what they say but only, as Alice tells us, what we say they mean." *Id.* (citing L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND (London 1865)). Having stated the argument, the Second Circuit answered it:

> it is the task of judges to start with the language of a statute and to reach a judgment that applies that language to a particular set of circumstances in a manner consistent with the statute's stated objectives. The fallacy in the [defendants'] argument is their failure to recognize that in construing a statute, the task of the courts is to interpret the words of the statute in light of the purposes that animated the lawmakers in enacting it.

Id. at 1537 (holding that common law or dictionary meaning of term "employer" is inappropriate in the context of a remedial and protective statute).

We agree with the view taken by the Second Circuit. A narrow reading of the word "employer" as used in the Act is inconsistent with the statute as a whole. The purpose of the Act is to ensure that the veteran "who was called to the colors not be penalized on his return by reason of his absence from his civilian job." *Fishgold*, 328 U.S. at 284. The Act is to be liberally construed in light of this purpose. *See Coffy*, 447 U.S. at 196; *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977); *Fishgold*, 328 U.S. at 285; *Lang v. Great Falls School Dist. No.1 & A*, 842 F.2d 1046, 1048 (9th Cir. 1988); *Earls v. Atchison, Topeka & Santa Fe Ry.*, 532 F.2d 133, 136 (9th Cir. 1976). Congress has manifested extreme solicitude for the returning veteran, *Carter v. United States*, 407 F.2d 1238, 1251 (D.C. Cir. 1968) (supp. op.), and

"made clear that claims under the Act are to be governed by principles of equity." *Lang*, 842 F.2d at 1051.

The Supreme Court has instructed us "to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold*, 328 U.S. at 285. Consistent with this teaching, we have taken the position that we will not "place undue emphasis on the parties' imprecise 'labels and definitions' to define 'rights guaranteed by the Act.'" *Lang*, 842 F.2d at 1050 (quoting *Smith v. Industrial Employers & Distributors Ass'n*, 546 F.2d 314, 317 (9th Cir.), *cert. denied*, 337 U.S. 939 (1949) (despite generally strict construction of jurisdiction); *see also Feore v. North Shore Bus Co.*, 161 F.2d 552, 553-54 (2d Cir. 1947) (finding jurisdiction to award back pay when reinstatement not sought, although the statute only provided for such awards "as an incident" to reinstatement).

Other courts have exercised jurisdiction over a pension fund, alone, despite the Act's language in section 2021 creating rights against an "employer," and despite the reference to "employer" in the jurisdictional grant of section 2022. *See, e.g., Voliva v. Seafarers Int'l Union of N. Am.*, 680 F. Supp. 216 (E.D. Va.), *aff'd*, 858 F.2d 195 (4th Cir. 1988) (all defendants except the pension plan dismissed early in the case); *Akers v. Arnett*, 597 F. Supp. 557 (S.D. Tex. 1983), *aff'd*, 748 F.2d 283 (5th Cir. 1984) (suit against trustees of longshoremen's association pension fund); *United States ex rel. Reilly v. New England Teamsters & Trucking Indus. Pension Fund*, 737 F. 2d 1274 (2d Cir. 1984) (district court held that the pension fund was the employer; defendant fund did not argue this issue on appeal).

In *Grzyb v. The New River co.*, 793 F.2d 590 (4th Cir. 1986), the employer was joined as a defendant and then the claim against it was dismissed because of laches. Despite the lack of the "employer" as a continuing party, the *Grzyb* court held that the pension plan incorrectly denied past military service time credit and affirmed judgment against the plan alone.

> In considering the proper application of § 2022, it is important to note, first, that there is substantial case law to the effect that the remedies provided in the Veterans Act are equitable in nature. Second, there is a strong public policy against the forfeiture of pension benefits . . . and turning specifically to the provisions of the Veterans Act, strong authority that the Act is to be treated liberally, so as to benefit tose who have served in the armed forces.

Id. at 592 (citations omitted).

The First Circuit has taken a somewhat hybrid approach to how the term "employer" should be treated in the Act. In *Bunnell v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 655 F.2d 451 (1st Cir. 1981), *cert. denied*, 455 U.S. 908 (1982), the district court had held that the fund was the employer for purpose of the Act, although not in the traditional sense. *Bunnell*, 486 F.Supp. 714, 718 (D. Mass. 1980). The First Circuit affirmed, but stated that it was "not concerned" with whether the pension fund could be defined as an employer. *Bunnell*, 655 F.2d at 452.

> Where, however [the employer] contracted for Fund to assume obligations for its employees' past services that treated returned veterans less favorably than its other employees, [the employer] directly violated the Act. It must equally be a violation for Fund to participate, and apply [the employer's] contributions to inure to the benefit of non-veteran employees and discriminate against veterans.

Id. The First Circuit had "no difficulty in fashioning this remedy, or in the concept that suit may be brought directly against the Fund." *Id.* at 453 (citing the Ninth Circuit decision in *Smith*).

In view of the remedial nature of the Act, the Supreme Court's teaching that the Act should be given "as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits," *Fishgold*, 328 U.S. at 285, this circuit's commitment to a liberal interpretation of the Act consistent with *Fishgold*, and decisions from other circuits which have reached the same result, we hold that the district court had jurisdiction over Imel's suit against the Fund.

C. *The Employer as a "Necessary Party"*

The Fund also argues that Imel's suit against it is fatally flawed because Imel's employer is a "necessary party," and no employer was sued.

The last sentence of section 2022 of the Act provides: "In any such action only the employer shall be deemed a necessary party respondent." Act, § 2022. This language was included to simplify the procedure for veterans asserting claims. *Bunnell*, 486 F. Supp. at 720. "If those parties [unions, other employees and other parties] had been *necessary*, individual veterans would have been greatly discouraged from asserting meritorious claims by the cumbersomeness and expense of litigation." *Id.*

Here, the Fund is the only party with a significant interest in the proceeding, it is the party who will provide any relief, and in light of the objectives of the Act it is the only appropriate party for Imel to hale into court in this litigation. *See* 1963 Fund Plan, Art. VII, § 1 ("no Individual Employer has any liability, directly or indirectly, to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in the Collective Bargaining Agreement"). To mechanically *require* the addition of individual construction industry contractors for whom Imel worked "would be, in many cases, to convert what was intended as a favor into a burden." *Tsang*, 173 F.2d at 206 (italics deleted) (quoting *Ames v. Kansas*, 111 U.S. 449, 464 (1884)). "The remedy was intended to be simple and prompt." *United States ex rel. Deavers v. Missouri, K. & T.R. Co.*, 171 F.2d 961, 963 (5th Cir.), *cert. denied*, 337 U.S. 958 (1949); *see Donner v. Levine*, 232 F.2d 185, 187 (2d Cir. 1956).

We conclude that Imel may maintain his suit against the Fund notwithstanding the absence of any of Imel's construction contractor employers as a party in the litigation.

D. *Imel's Return to Employment*

The Fund argues that even if Imel may maintain his suit against the Fund and may do so without including any construction contractor employer as a defendant, he still loses because he

did not return to work for the same construction contractor he had worked for immediately prior to entering military service. We disagree, Imel returned to the appropriate party—he went through the same Union hiring hall[2] procedure as he did before his military service and was assigned to a contractor later covered under the pension plan for seniority credit. Imel had no control over where he was sent to work. Moreover, the district court found that benefits under the Plan were designed to reward an employee according to his length of service within the industry itself and not with any single contractor. This finding is consistent with the Fund's own documentation. The 1963 Fund Plan specifically provides: "During the periods between August 1, 1937 and August 1, 1962, an Employee shall be entitled to Past Service Credit for each Plan year, or a portion thereof, he was employed in the Building and Construction Industry." 1963 Fund Plan, Art. IV, § 2(a).

The district court's focus on the industry as an employing unit is also supported by section 2021(a)(B)(ii) of the Act. That section provides that successors in the interest must afford a veteran the same rights as their predecessors. Act, § 2021(a)(B)(iii). This language of the Act reflects Congress' desire for a broad right to reemployment and seniority, not limited by technical changes in corporate form or reorganization. In the Northern California construction industry, the multi-employer group is made up of changing employer members: contractors enter and leave the area and go in and out of business. Nonetheless, the multi-employer group is a consistent entity, bound by its collective bargaining agreements with the Union and its participation in the trust which created the Fund.

The Fund argues that the district court's decision creates a huge financial burden on the Fund and the construction industry because it requires that pension credits be given to all persons returning from compulsory military service who return to the Northern California construction industry, without regard to whether they return to the same employer for whom they worked immediately preceding their military service. We reject this

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[2] The Fund does not dispute the district court's finding of a hiring hall.

ecnonomic argument. The Act's "very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service." *McKinney v. Missouri-Kan. Tex. R.R. Co.*, 357 U.S. 265, 272 (1958). As the district court found, Imel had been continually employed in the construction industry at the time he was called to military service. had it not been for military service, he would have continued in that employment, and indeed he returned to that employment upon his military discharge. Had it not been for his military service, Imel would have received seniority credit which others who continued their employment in the Northern California construction industry received. The district court's holding, which we affirm, may increase the financial burden upon the Fund, and as a result, the burden upon the Northern California construction industry. But this result is compelled by the Act. Imel's rights as a returning serviceman may not be subordinated to the Fund's and the construction industry's financial interests.

We conclude that by returning to work in the Northern California construction industry following his discharge from military service, Imel returned to the same "employer" for purposes of the Act.

E. *The Employment Position Imel Left*

Finally, the Fund argues that Imel failed to satisfy the requirement of section 2021(a) of the Act which provides that in order to be protected by the Act's seniority provisions, the returning veteran must show that he left a position, other than a temporary position, for military service. The Fund points out that Imel's employment by his last construction contractor preceding his military service was only casual, and the project he was working on for that contractor was of only limited duration. Thus, it is contended, Imel held only a temporary position when he was called into the service. We disagree.

The test for whether a position is other than temporary and subject to the Act "is whether the veteran, prior to his entry into military service, had a reasonable expectation, in light of all of the circumstances of his employment, that his employment would

continue for a significant or indefinite period." *Stevens v. Tennessee Valley Auth.*, 687 F.2d 158, 161 (6th Cir. 1982). Thus, for example, a seasonal employee may have a reasonable expectation of reemployment on the same seasonal terms. *See Stevens*, 687 F.2d at 162; *United States v. North Am. Creameries, Inc.*, 70 F. Supp. 36, 38 (d. S.D. 1947).

Here, the district court found that Imel "had a reasonable expectation that, but for the brief interruption during which he served in the military, he would have continued to work in the [Northern California] construction industry under the multi-employer pension plan in question and accordingly would have continued earning pension credits." *Imel*, mem. op. at 22. This finding is not clearly erroneous.[3] It establishes the basis for concluding that Imel's pre-service employment was not of a temporary nature. His employment was in the Northern California construction industry working for construction contractors in the multi-employer group; and he was continuously so employed for more than twenty-five years, except for the two years he spent in military service during the Korean War.

The district court's judgment is **AFFIRMED.**

TROOT, Circuit Judge, dissenting:

The majority opinion reaches its result by effectively stretching the word and the concept "employer" beyond all recognition, giving it new meaning that no ordinary person could possibly

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[3] The district court's finding is also supported by Imel's accumulation of preferential hiring rights for his work in the Northern California construction industry, rights which he had accumulated preceding his military service.

> The accumulation of preferential hiring rights makes the position non-temporary by investing it with an expectation of reemployment. . . . In fact, the prior accumulation of any seniority or length of service benefit which would otherwise be protected by the Act, [cites], is itself evidence that the returning veteran held something other than a temporary position. The accumulation of seniority-related benefits would not normally be a characteristic of a temporary position, as that term is used in the Act, *i.e.*, a "casual" position.

Stevens, 687 F.2d at 162.

anticipate or comprehend. All of a sudden, "employer" includes possibly an industry as a whole, a trust fund, or a union of which Mr. Imel was a member but for which he never worked. Unions in this circuit, as the Fund in this case, will certainly be surprised to discover that their members may be really their employees for certain purposes, and they will be more than interested to discover that they may have unexpected financial responsibilities for which no provisions have been made. I find the Second Circuit's answer to the "Alice in Wonderland" indictment of this type of abuse of the English language and the plain meaning of words to be unpersuasive. We *construe* statutes, yes, but we do not redefine words, especially when the redefinition carries important policy implications with it. That is up to the people who write dictionaries or Congress—not judges. The majority opinion calls this a "liberal construction" of the key word and the statute: I respectfully see it as verbal anarchy.

The majority opinion rewrites the law to achieve a desirable result. What it says is that as a matter of *policy*, Mr. Imel and people similarly situated should also receive the benefits of the Veteran's Readjustment act. Maybe so, but if we are to respect the concept of separation of powers and the prerogative of the legislature, that call should be made by Congress. What we believe Congress would have done if they had confronted this policy issue is irrelevant. This is not a case where we are called on to iron out fuzzy language. What is at stake is what the judiciary sees as the limits of its authority.

The Fund argues with vigor that what the majority does creates a huge financial burden on the Fund for which no provisions have been made. The majority opinion waves this off as an "economic argument." I see it as something a legislature would want to consider seriously.

Were I a member of Congress, I might find myself very sympathetic to the majority's policy reasons for wanting to include people like Mr. Imel within the scope of this Act. But as a judge, I must regrettably tell him he is in the wrong forum.

I would dismiss this case for lack of jurisdiction under 38 U.S.C. § 2022.

I dissent.

Appendix B

In the United States District Court for the
Eastern District of California

Civ. No. S-83-1406 EJG

Marion J. Imel,
Plaintiff,

v.

Laborers Pension Trust Fund of Northern California,
Defendants.

[Filed Oct. 25, 1988]

MEMORANDUM OF OPINION

This matter came before the court for trial on July 27 and 28, 1987. Norman Nayfach appeared for plaintiff. Thomas Stanton appeared for defendant. The matter proceeded as a court trial without a jury. At the close of testimony, a post-trial briefing schedule was established. Trial briefing has been completed and the matter stands submitted. The court has considered the pre- and post-trial briefs, the testimony and exhibits from trial, as well as the reporter's transcript of deposition testimony, and the court now enters the following findings and conclusions pursuant to Fed.R.Civ.P. 52.

This case presents the narrow question of whether plaintiff is entitled to a recalculation of his pension benefit (which is administered by defendant) so as to credit him for his military service from March 6, 1953 to March 4, 1955.[1] However, this narrow question turns on the broader issue of whether it is a violation of 38 U.S.C. § 2021 [Veterans Reemployment Act] for a multi-employer pension plan such as defendant to allow credit for military service *only* to veterans who return to work for the exact same company (or business entity) for which the veteran worked immediately prior to the military service, and not to veterans who

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[1] As of the time of trial, such a recomputation would raise his monthly benefit from approximately $825 to $890—for a difference of $65 per month.

return to another employer covered by that same pension plan. As will be seen, plaintiff contends that when a multi-employer pension plan is involved, it is the particular industry that must be treated as the "employer" rather than the specific contractor. Thus, says plaintiff, it is a violation of the Act not to award military service credits to a veteran who has returned to a job within the particular industry specifically covered by the multi-employer pension plan. Defendant, however, concludes that there is no violation of § 2021 because the defendant trust fund is not the "employer" of plaintiff within the meaning of § 2021. Defendant also asserts that the military service credit provision of the Act applies only when the veteran returns to work for the same contractor, and that the element of a multi-employer pension plan changes nothing in that regard.

The Court has jurisdiction over this dispute pursuant to 38 U.S.C. § 2022 and 28 U.S.C. § 1331.

Background of the Plan

The defendant is a multi-employer pension trust fund established in 1963 by two collective bargaining contracts pursuant to 29 U.S.C. § 186(c)(5). The contracts involved two groups of employers (i.e., two chapters of the Associated General Contractors of America) and the Northern California District Council of Laborers. These two contracts are referred to as the "Laborers 46 Northern California Counties' Master Agreement" and the "Laborers 46 Northern Counties' Tunnel Master Agreement." The latter pertains to employees who work underground or in and around tunnels, etc. Under the pension plan, employers make contributions for each hour paid and/or worked by covered employees. Since the enactment of the Employee Retirement Income Security Act of 1974 [ERISA], the plan has been governed by 29 U.S.C. § 1001 *et seq.*

To qualify for a pension, an employee must earn a certain minimum amount of industry service-year credits. A service-year credit is earned by working in covered employment for at least 1,000 hours in a given year. Where service in a year is less than 1,000 hours, the service is prorated and credited in one-quarter

increments for each 250 hours worked. Once an employee has worked over 1,000 hours in a year, no further service credit is given for that year.

The general idea is for the employee to build up enough service credits within the industry over the years to be able to qualify for a pension. Additionally, once the minimum number of credits is earned, the total number of credits affects the amount of the pension benefits. As noted above, the plan became effective in 1963, but contributions commenced on August 1, 1962. Service in the specified industry prior to August 1, 1962 is covered and is referred to as "past service credit." Covered service after that date is referred to as "future service." For both, the same hourly credit formula applies (i.e., 1,000 hours = one year of credit, 250 hours = ¼ of a year of credit).

Under the 63 plan, an employee qualified for a so-called "normal" pension by attaining age 65, acquiring 20 years of credited service, and working at least 500 hours in covered employment after August 1, 1962. That normal pension resulted in a benefit of $55 per month. Vesting occurred upon 15 years of service and attainment of age 50. In 1972, the age limit on vesting was eliminated and in 1973 the number of years to vest was dropped to 10. On October 18, 1977, the plan was amended retroactively to June 1, 1976 to provide that a returning veteran would receive credit for his period of military service if he "was employed in a permanent position . . . immediately prior to such military service and was reemployed by the employer for whom he was working immediately prior to his entry into such military service." (Plan, Article 6, § 6.02a).

Plaintiff's 25-year-plus career in covered industry employment was interrupted when he was inducted into active military duty during the Korean war [March 6, 1953 to discharge date of March 4, 1955]. Upon discharge, plaintiff returned to the specific industry covered by the pension plan, however, defendant has not credited plaintiff with his military service in the calculation of plaintiff's benefits.

PERTINENT STATUTORY PROVISIONS

Section 2021 of the Veterans Reemployment Rights Act ("VRRA" or "the Act") provides in pertinent part:

> "(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act . . . for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in Section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
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> * * * * *
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> "(B) . . . such person shall—
>
> (i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority status, and pay; . . .
>
> (b)(1) Any person who is restored . . . shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.
>
> (2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be restored or reem-

ployed in such manner as to give such person such status in his employment as he would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment."

38 U.S.C. § 2021.

Plaintiff's Employment Record

Plaintiff joined the subject Union in June 1951 and was dispatched to the Utah Construction Co. to work on the Bear River Dam diversion tunnel project in Amador County. (he worked above ground—clearing brush, etc.) After approximately two weeks he was laid off and registered on the "out-or-work" list at the Union hall. Shortly thereafter he was dispatched to a tunnel job working for Walsh Construction Co.—also on the same dam project. He worked at this job from June 1951 to September 1951 when the job ended. Plaintiff was again placed on the "out-of-work" list at the Sacramento hall. The Folsom Dam project was starting up about that same time. Within a few days of being returned to the list, plaintiff was dispatched to a job at the Folsom site to work for the Atkinson Co. doing power house construction excavation work. That job site was flooded in 1951, and plaintiff was consequently laid off. His name was returned to the "out-of-work" list and two weeks later he was dispatched to work for T.E. Connelly on the Folsom diversion tunnel where he was employed for about four months and then laid off. Once more he was returned to the "out-of-work" list and within a week was dispatched back to work for Atkinson, where he worked until November 1952. He was again laid off in approximately December 1952, and then returned to the "out-of-work" list. In January 1953, he was dispatched to another job working for Tarlton Construction. This time, he worked on a diversion tunnel for the Sly Park Dam project in Pollock Pines.

On March 6, 1953, while working for Tarlton, plaintiff was drafted into the military. He served until March 4, 1955 and was honorably discharged. However, the Tarlton work on Sly Park

project had ended in late 1953. Thus, plaintiff reported back to the union hall and shortly thereafter (i.e., April 1955) he was dispatched to a brush clearing job with the Utah, Bates and Rogers Co. working on a tunnel project at Oroville, California. Upon returning to the pension covered industry following his military service, plaintiff resumed the same pattern of lay offs and subsequent union dispatches to new projects. That pattern continued with plaintiff working as a laborer in the pension covered industry in Northern California doing primarily outside or tunnel labor on dam projects until his retirement in January 1979. Throughout that period, plaintiff made contributions to the subject multi-employer retirement plan. For reasons discussed below, the court finds that but for plaintiff's military service he undoubtedly would have continued with that pattern by working in the same pension covered employment from March 6, 1953 to March 4, 1955.

Subject Matter Jurisdiction Under The
Veteran's Reemployment Rights Act

Plaintiff relies on 38 U.S.C. § 2022 to invoke the jurisdiction of this court. That section confers on the United States District Courts the jurisdiction and power to order compliance by any employer with § 2921(a), (b)(1) or (b)(3), or § 2024 of Title 38 U.S.C. Defendant asserts that it is not an "employer" and thus there is no jurisdiction under § 2022. Defendant places emphasis on the word "employer" in § 2022 and argues that no jurisdiction is conferred where the defendant is a pension trust fund and not an "employer." However, the court's jurisdiction over this matter cannot be seriously disputed. *Smith v. Industrial Employers and Distrib. Ass'n,* 546 F.2d 314 (9th Cir. 1976), *cert. denied,* 431 U.S. 965, 96 S.Ct. 2921 (1977) specifically held a union designated trust fund liable under § 2021(b)(1) for failure to credit an employee with time spent in the Army following an induction in 1942. Although subject matter jurisdiction under § 2022 was not contested in *Smith,* the Ninth Circuit could not have affirmed the District Court's judgment against the fund without concluding that there was subject matter jurisdiction under § 2022. Thus, *Smith* necessarily decided this question and is controlling here.

Moreover, the First Circuit in *Bunnell v. New England Teamsters and Trucking Fund*, 655 F.2d 451 (1st Cir. 1981), *cert. denied*, 455 U.S. 908, 102 S.Ct. 1253 (1982) dealt with a specific challenge to subject matter jurisdiction under § 2022 and, citing the Ninth Circuit's ruling in *Smith*, squarely held that suit may be brought directly against the fund. Clearly, this court has jurisdiction even though the defendant trust fund is not the employer.

ERISA and De Novo Standard

Defendant further asserts that this court must defer to defendant's interpretation of the plan provisions. A final decision by the Board of Trustees was rendered on plaintiff's military service on December 9, 1980 when it ruled that plaintiff was not entitled to military service credits because he did not return to work for Tarlton. When a pension trust fund decision is challenged under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* [ERISA], as to the funds interpretation of the terms of the pension plan, that decision "will not be reversed by the courts unless [it is] arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133 (9th Cir. 1984), *cert. denied*, 469 U.S. 1189, 105 S.Ct. 959 (1985). Here, however, plaintiff does not contest defendant's interpretation of the terms of the plan. Rather, plaintiff asserts that the failure to include military service credit in the calculation of his pension under this multi-employer pension plan violates 38 U.S.C. § 2021. Defendant's interpretation of the terms of the plan is undisputed and irrelevant. Moreover, defendant's interpretation of the law (i.e., 38 U.S.C. § 2021) is entitled to no deference, and the court must make its own legal determination.

Furthermore, the discussion in defendant's trial brief on the question of military service credit in the context of ERISA is inapposite. Defendant argues, in effect, that the plan provisions challenged here do not violate § 2021 because they do not violate ERISA. Defendant seems to be suggesting that if § 2021 was violated, the parties agreed to do so, and that such an agreement does not violate ERISA. Defendant argues that the plan administrators must administer the benefits in accordance with the

documents and instruments governing the plan insofar as they are consistent with ERISA, i.e., 29 U.S.C. § 1104(a)(1)(D). The only plan provision regarding credit for military service is § 6.02. It specifically requires that the veteran be "reemployed, by the employer for whom he was working immediately prior to his entry into such military service." Plaintiff was not so reemployed, and therefore, says defendant, the plan provision and ERISA have been satisfied.

However, the question here is whether the Veterans Reemployment Act, not ERISA, has been violated. Defendant's argument ignores the point that whatever a multi-employer bargaining unit and a union may agree to, they cannot agree to alter what the Congress has required by statute as non-negotiable. Thus, the plan's obligations regarding military service credits are controlled by 38 U.S.C. § 2021 and the case authority which make it clear that § 2021 protection applies to pension benefits and trust fund plans. If the contracting parties wish to create rights or protections that exceed that mandated by the Congress, they may do so. However, they may not, by contract, fail to provide the protections Congress requires. Thus, the court must proceed to determine whether it is a violation of 38 U.S.C. § 2021 to refuse plaintiff credit in his pension computation for his military service.

Credit for Military Service

The language of § 2021 was described by the United States Supreme Court in *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 100 S.Ct. 2100 (1980) to "mean that the returning veteran 'does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war'." *Id.* at 196, 100 S.Ct. at 2104. (citation omitted) *Coffy* noted that the Act requires that a person covered by § 2021 be given " 'such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously' during the period of military service. § 2021(b)(2)." *Id.* The court also emphasized that "the statute is to be liberally construed for the benefit of the returning veteran." *Id.* (citation omitted).

Regarding pension benefits, *Coffy* observed that the test for whether the statute applies is whether a particular benefit is a "perquisite of seniority". *Id.* The court noted its previous holding in *Alabama Power Co. v. Davis*, 431 U.S. 582, 97 S.Ct. 2002 (1977) that pension benefits were "perquisites of seniority" if the true nature of the benefits was "a reward for length of service." *Id.* at 197-98, 100 S.Ct. at 2105. *Coffy* restated the two-prong test of *Alabama Power* that: (1) there must be a reasonable certainty that the benefit would have accrued if the employee had not gone into the military service; and (2) the nature of the benefit must be a reward for length of service. The court proceeded to evaluate the plan before it, and determined that both prongs of the test were met. Comparison of the plan involved here with that evaluated in *Coffy*, shows that the second prong of *Alabama Power* is clearly satisfied. As noted above, the plan is structured in such a way that one must accrue service credits over a period of years to qualify for a pension. Once an employee reaches 1,000 hours in a given year, no further credit is given in that year toward qualifying for the pension. Thus, to attain the requisite years of service credit, one must actually earn the hours of service over an extended period of years. Thus, *Coffy* appears dispositive as to the "perquisite of employment" test.

As for the first prong of *Alabama Power* (i.e., reasonable certainty that the benefit would have accrued absent military service interruption), plaintiff cites defendant's response to a crucial discovery document, i.e., plaintiff's request for admission no. 5. That response admits that "plaintiff's pension benefits, under defendant's pension plan which is the subject of this action, would have accrued, with reasonable certainty, had plaintiff been continuously employed as a laborer in the construction industry in Northern California and not left for military service." Plaintiff contends that this admission makes it clear that the "reasonable certainty" prong is met, and that under § 2021(b)(2), plaintiff was entitled to receive the same benefits he would have received had he never temporarily left that industry for military service. Indeed, defendant's response in admission No. 5 makes that very concession.

Moreover, the reasonable certainty prong was confirmed by the evidence adduced at trial. Defendant's admission regarding the "reasonable certainty of accrual" test is made even more compelling by the testimony at trial which clearly showed that the union operated a *de facto* "hiring hall" for the industry in Northern California prior to 1959.[2] The essence of that *de facto* hiring hall procedure is that the union controlled the dispatch of employees to the pension covered jobs throughout the industry in Northern California. Use of that practice essentially guaranteed that as long as plaintiff sought work by registering at the union hall he would be dispatched to jobs covered by the pension plan here in dispute. The significance of such a practice is two fold. It is probative of the reasonable certainty prong in that the pattern of job dispatches before and after plaintiff's military service shows a high probability that, but for his service during the Korean war, he would have worked in covered employment during the war years. It also shows that the union hall itself controlled the hiring process and was considered to be the appropriate location to make application for reemployment. Thus, to assure continued employment in a pension covered job, plaintiff reported to the appropriate union hall to be dispatched to a job site.

Plaintiff's testimony shows that in order to obtain work at a given site, the laborer had to appear at the union hall and wait to be dispatched to work by the union. The union dispatched workers whose names were on the "out-or-work" list to job sites as contractors notified the union of their man power needs. Until 1959, that list consisted of tablet on which the union wrote the names of individuals needing work. Plaintiff testified that his process was treated as mandatory for obtaining work.

Although defendant strongly disputes that any hiring hall existed prior to 1959, plaintiff's testimony is corroborated by several witnesses. Audrain Weatherl, the now assistant regional manager of the union and former union field representative, testified that the only significant change in that job referral practice that occurred in 1960 which deviated from the pre-1959

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[2] After 1959 certain changes were adopted that firmly established a hiring hall.

procedure was the use of a peg board. Use of the board made information regarding who was next in line for work immediately visible to the member in the hall and eliminated the need to examine the tablet that had been used in the past. Prior to that change, members simply signed in on a tablet which was otherwise used for the same purpose. When a member was finally dispatched to work, his name was crossed off the list by drawing a line through it. [Tr. 77-79].

Glen Daniels, a union member and laborer in the relevant industry, testified regarding his experiences in being dispatched from the hiring hall from 1953 through 1957. When sent to a job, he was provided a dispatch slip from the union. Upon arrival at the job site, he presented the contractor the original of the slip and retained a carbon copy for himself. [Tr. 82-83].

Emery Snyder, another union member and laborer in the Northern California industry during the relevant time periods, described the hiring hall practices in even more detail and his testimony reveals that the process was considered mandatory. [Tr. 91-92]. Robert Day, also a laborer in the relevant industry in 1958 and 1959, described how he was required by a construction company superintendent to obtain clearance through the union hall before going to work. [Tr. 93-95]. Kenneth Fossum, another union member in the relevant industry, described how he was required to use the hall to obtain work as a laborer in 1958. [Tr. 97-101]. The testimony of those witnesses was credible and went unchallenged by cross examination.

To dispute the existence of a hiring hall, defendant offered the deposition testimony of Victor Van Bourg, an attorney that represented the union. He stated that prior to 1959, the Master agreement contained no provisions requiring an employee to go through the hiring hall process. He opined that such a procedure probably did not exist prior to 1959. He based that opinion on the absence of language in the agreement providing for such a procedure prior to 1959, his legal opinion that such a system was illegal prior to 1959, and his conversations with others regarding the topic. However, Van Bourg conceded that he had no personal knowledge regarding actual Local 185 practices at the time. Without such personal knowledge, his opinion is of little probative

value in refuting the several plaintiff's witnesses who testified from personal experience.

Defendant further offered the deposition testimony of Joseph Karan, an assistant business representative of Local 185 from 1953 to 1976. He stated that on a few occasions he was able to obtain jobs by talking to the job site foreman rather than going through the union hall.

In resolving this factual conflict, the court relies heavily on the particularity as to details, and the personal knowledge, and the overall demeanor of plaintiff and his witnesses. In short, their testimony was credible. Moreover, it was not directly contradicted in any particulars by defendant's witnesses. At best, defendant's witnesses provided a motive for why the Master Agreement would remain silent on a hiring hall process (it was believed to be illegal at the time), and indicated that occasionally, a laborer could obtain a job directly from the job site foreman. However, plaintiff's evidence of a *de facto* hiring hall process was not seriously challenged by competent evidence. In light of the testimony at trial, the court finds that a *de facto* hiring hall procedure was operated in the Northern California industry prior to 1959 and plaintiff was generally required to go through the union to secure employment in the industry. Therefore, when plaintiff reported to the Local 185 hall within a few days after his honorable discharge in March 1955, reactivated his regular dues paying membership, and placed himself on the so-called "out-of-work" list, he made application for reemployment for his preservice job at the location where individuals in the covered industry were expected to apply. Indeed, that application proved fruitful when plaintiff, within 90 days of his release from active military duty, was dispatched to another trust fund covered construction project, just as he had been dispatched to many other projects before and after his military service.

The court further finds that the true nature of the benefits involved here in to reward the length of service within the industry itself and not with any single contractor. Indeed, the benefit plan appears designed by the several participating employers with that specific goal in mind so as to accommodate the construction industry's inherent need to fill positions in an indus-

try that has a tendency to provide individual jobs of only short duration. The court further finds that there is a reasonable certainty that plaintiff's pension benefits would have continued to accrue in full had plaintiff not entered military service. Accordingly, both prongs of *Alabama Power* are met and the pension credits in question are so-called "perquisites of seniority." In sum, there appears little doubt that this plan fits into the *Alabama Power* and *Coffy* analysis regarding § 2021 application to pension benefits.[3]

"Other than Temporary Position"

Section 2021(a) also requires that the veteran, before he is covered by the seniority protection provisions of the Act, be one who left "a position (other than a temporary position) in order to perform such military service." Plaintiff and defendant seem to talk past each other regarding this element. Defendant focuses on plaintiff's immediately preceding employer [Tarlton] and characterizes the work for that single employer as "casual" and thus "not other than temporary." Defendant also emphasizes the limited duration of the project being worked on. Plaintiff, on the other hand, focuses on plaintiff's pre-military service employment in the multi-employer trust fund covered industry itself.

Plaintiff present a very compelling analysis for why the industry itself (which is composed of the employer who make up the trust plan) must be the focus, rather than a single contractor, when a pension is pursuant to a multi-employer plan. The very purpose for such plans is to assure a stable workforce by providing workers the type of pension vesting and protection that would be available from a single long term employer.

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[3] That the particular project on which plantiff worked prior to his military service was completed, and that the laborers were laid off before plaintiff was discharged from the military, is not dispositive. The Supreme Court has held for purposes of calculating seniority rights, that the veteran is to be presumed continuously employed regardless of the possibility of illness, layoff, or other economic uncertainties. *See, e.g., Palmarozzo v. Coca-Cola Bottling Co. of New York, Inc.*, 490 F.2d 586, 591 (2d Cir. 1973) and the authorities cited therein.

> "Multi-employer plans were originally developed in industries where job changes were frequent and there was little continuity in the employer-employee relationship. For example, in some industries employees are often hired for a specific project, and their employment terminates with the project's completion. In other industries conditions of fierce competition, frequent business failures or recurring layoffs prevent the establishment of a stable employer-employee relationship. In these kinds of industries workers cannot obtain meaningful pension rights from a single employer. Thus, collectively bargained-for multi-employer pooled funds or plans came into being to provide pension protection for workers in highly volatile industries."

Textile Workers Pension v. Standard Dye and Finishing, 725 F.2d 843, 847 (2d Cir. 1984). The legislative history of the Multi-employer Pension Plan Act of 1980 further describes the balance struck in favor of stability of the work force and continuity of employee health and welfare benefits.

> "The expansion of private pension plan coverage in the United States over the past three decades is attributable in large measure to the establishment and growth of collectively-bargained plans, and particularly multi-employer plans. There are now about 2,000 multi-employer plans of the defined benefit type, covering about 8,000,000 participants, workers and retirees. More than half those plans, covering almost 30 percent of all such participants, are in the construction industry. Almost 25 percent of participants in defined benefit multi-employer plans are in plans in manufacturing industries, which constitute about 14 percent of all such plans.
>
> The term multi-employer plan is used here in its traditional context, to refer to a plan maintained pursuant to one or more collective bargaining agreements which cover the employees of two or more unaffiliated employers. the signatories to the collective bargaining (or related) agreements pursuant to which a multi-employer plan is maintained, normally agree to contribute at rates specified in such agreement(s) for hours worked by employees, units of production such as

coal mined or cargo shipped, or a percentage of compensation, as the case may be. Contributions are made to a pooled fund administered by a board of trustees composed equally of employer designated and union designated trustees. The trustees normally have the authority to manage the assets of the plan and to set eligibility requirements and benefit forms and levels.

Multi-employer plans have historically provided a high degree of benefit security to plan participants because of the features of "pension portability" and "self-insurance" which characterize such plans. Pension portability under a multi-employer plan means that a participant's benefit is based on service with all contributing employers for whom the participant who moves from one contributing employer to another, who might otherwise not be eligible for benefits based on services with any one employer, to receive a pension if his or her total service with all the contributing employers is sufficient to satisfy the plan's requriements for a vested benefit. This feature is particularly but not exclusively important in industries such as construction, water transportation, and the performing arts, which are characterized by mobility of employees, or employers, or rapid turnover of both. Multi-employer plans have also proved to be an important and viable mechanism for providing retirement income in industries as diverse as mining, retail foods, and trucking."

"Multi-employer plans are also characterized by a 'self-insurance' feature which enables a plan participant to retain benefit credits earned for service with a contributing employer even though the employer subsequently ceases contributing to the plan. A contributor's obligation to continue to fund the benefit obligations of a multi-employer plan normally ceases upon the contributor's withdrawal from the plan, whether as a result of the cessation of the contributor's covered operation or the termination of the collective bargaining relationship. Thus contributors who remain in the plan and newly entering contributors have the burden of funding the unfunded benefit obligations for employees of a withdrawn employer."

House Report No. 96-869 at 52-53, 96th Cong. 2d Sess., reprinted in 1980 *U.S. Code Cong. Admin. News* at 2920-21.

The House Report shows that the very intent of the Multi-employer Pension Plan Act is to treat the particular industry covered by the plan as the "employer" for pension purposes so that vesting rights are not compromised as a result of frequent lay offs when projects of limited duration come to an end. Similarly, it is clearly the purpose of 38 U.S.C § 2021 to protect a veteran's status under such a plan so that a period of military duty does not disadvantage the veteran's benefits in any way.

Defendant's version of the Act's protection of a returning veteran's pension rights during a period of military service would completely negate such protection whenever a multi-employer pension plan is involve. Moreover, defendant's version as a practical mater would deny military credit for virtually any employee in the construction industry. As noted in *Standard Dye,* such jobs are nearly always of a fixed short term nature. In view of the purpose for multi-employer plans and § 2021, defendant's position cannot be reconciled with the Supreme Court's admonition that the Act be *liberally construed* in favor of the returning veteran. *Coffy*. Although the Act's protection of pension rights under industry wide multi-employer plans may cause the plan some inconvenience that was not originally contemplated by the contracting parties, "[t]he Act was premised on the recognition that the man in the military is not represented at the bargaining table and that any special status accorded veterans is an inconvenience to union and management alike." *Palmarozzo v. Coca-Cola Bottling Co. of New York, Inc.,* 490 F.2d 586, 592 (2d Cir. 1973).

Here, it is clear that under all of the circumstances surrounding his employment in the covered industry, plaintiff had a reasonable expectation that, but for the brief interruption during which he served in the military, he would have continued to work in that industry under the multi-employer pension plan in question and accordingly would have continued earning pension credits. Under *Coffy,* the Act requires that plaintiff not merely be placed back on the pension seniority escalator at the point he stepped off. Rather, he must be placed back at the precise point he would have

occupied but for the disruption occasioned by his military duty. The evidence in this case shows that point can only be reached by a pension recalculation that includes the credit plaintiff seeks herein.

Conclusion

Because plaintiff's rights under the Act were violated when defendant denied plaintiff pension credit for his period of military service, it is hereby ordered that defendant include such period in the computation of plaintiff's past credited service and total benefits, and such inclusion shall be retroactive to February 1, 1979 (the date of plaintiff's application for benefits). Plaintiff shall be paid in a lump sum the total back due benefits as a result of that recomputation and plaintiff is hereby awarded prejudgment interest on that amount at the rate of 7%.[4] *See Hanna v. American Motors Corp.*, 724 F.2d 1300, 1311-12 (7th Cir. 1984) and *Hembree v. Georgia Power Co.*, 637 F.2d 423, 430 (5th Cir. 1981). It is further ordered that upon such recomputation defendant shall adjust plaintiff's future monthly pension payments to reflect the inclusion of the period of plaintiff's military service. Any application for fees or costs shall be made pursuant to Local Rules 292 and 293.

IT IS SO ORDERED.

DATED: October 25, 1988.

EDWARD J. GARCIA
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

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[4] There being no federal statutory rate, the court adopts the California statutory rate of 7%. *See Hanna v. American Motors Corp., supra* at 1312, n.13; and *Pacific Southern Mortgage Trust Co. v. Insurance Co. of North America*, 166 Cal.App. 3d 703, 716-17, 212 Cal.Rptr. 754, 761-62 (Cal.Ct.App. 1985) (4th Dist.).

United States District Court
Eastern District of California

Case Number: CIVS-83-1406 EJG

Imel

v.

Laborers Pensions Trust Fund of Northern California

JUDGMENT IN A CIVIL CASE

[Filed October 25, 1988]

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED ACCORDING TO THE COURT'S ORDER ENTERED OCTOBER 25, 1988

Entered October 25, 1988

Date: October 25, 1988

J.R. GRINDSTAFF
Clerk

P. NELSON
Deputy Clerk

Appendix C

United States Code, Title 38, Chapter 43,
Sections 2021 and 2022

Section 2021. Right to reemployment of inducted persons; benefits protected

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of an employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform, as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of such employer or the employer's successor in interest, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case.

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

(3) any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

(c) The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.

Section 2022. Enforcement procedures

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or 2024 of this title, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of

business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter.